

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>THERISA R. MARTIN</b>	)	
Claimant	)	
VS.	)	
	)	
<b>IBP, INC.</b>	)	Docket No. 165,267
Respondent	)	
Self-Insured	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant requested review of the Award dated August 20, 1996, entered by Assistant Director Brad E. Avery. The Appeals Board heard oral argument February 6, 1997. Jeff K. Cooper of Topeka, Kansas, was appointed Board Member Pro Tem to serve in place of Board Member Gary M. Korte who recused himself from this proceeding.

**APPEARANCES**

Diane F. Barger of Wichita, Kansas, appeared for the claimant. Tina M. Sabag of Dakota City, Nebraska, appeared for the respondent. Derek R. Chappell of Ottawa, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Assistant Director awarded claimant permanent partial general disability benefits for an 18 percent whole body functional impairment. Claimant requested the Appeals Board to review the issues of (1) nature and extent of injury and disability, (2) average weekly wage, and (3) whether certain medical bills should be ordered paid.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record the Appeals Board finds as follows:

The Award entered by the Assistant Director should be modified to increase claimant's permanent partial general disability to 58 percent.

(1) Claimant began working for the respondent trimming meat in October 1990. In January or February 1991, claimant began experiencing pain and other symptoms in her neck, shoulders, and arms. Claimant reported her symptoms to respondent's medical department and was referred for treatment. In May 1991, claimant took maternity leave and remained off work until January 1992, when she returned to her former job as an "eye trimmer," whereupon she began to experience a recurrence of symptoms.

Claimant testified she consulted respondent's personnel office regarding her physical difficulties and was advised she could not be placed into a different job without following the bidding process. Claimant then bid upon and obtained a machine operator's position but, after a trial period, was unable to perform the job due to her physical complaints. At that point claimant returned to her "eye trimmer" position. Claimant terminated her employment with respondent on April 7, 1992, because of her continuing physical complaints.

After leaving respondent's employ, claimant sought additional treatment and underwent bilateral carpal tunnel release surgery in May and June 1992.

The only physician to testify, Joseph Sankoorikal, M.D., examined claimant at her attorney's request in April 1993. He believed claimant had myofascial pain syndrome, postoperative bilateral carpal tunnel syndrome, early spondylosis at C4-5, sleep disturbance related to the myofascial pain syndrome, generalized deconditioning, and possible reflex sympathetic dystrophy in the right arm. Dr. Sankoorikal related all but the spondylosis to the work claimant performed for the respondent. Based upon the myofascial pain syndrome and postoperative bilateral carpal tunnel syndrome, the doctor recommended claimant limit her work to light duty where lifting and carrying was limited to 20 pounds maximum and, also, recommended claimant avoid repetitive motions.

Dr. Sankoorikal also testified claimant's myofascial pain syndrome might resolve to the point where claimant's lifting restrictions could be raised or eliminated. However,

because of the postoperative carpal tunnel syndrome he expected the medical restriction against repetitive motions would remain.

The claimant presented the testimony of vocational rehabilitation counselor Monty D. Longacre who testified that claimant lost 36 percent of her ability to perform work in the open labor market based upon Dr. Sankoorikal's medical restriction against repetitive hand activities and a 79 percent loss when considering all of the doctor's restrictions. In addition, Mr. Longacre testified that post-injury claimant retained the ability to earn \$5 per hour, or \$200 per week.

Because hers is an "unscheduled" injury, claimant's right to permanent partial general disability benefits is governed by K.S.A. 1991 Supp. 44-510e, which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Respondent contends claimant has failed to prove permanent injury to her neck and shoulders and, therefore, the lifting restrictions provided by Dr. Sankoorikal should not be considered when determining the extent of claimant's permanent partial general disability. The Appeals Board disagrees. Although Dr. Sankoorikal indicated claimant's neck and shoulder symptoms may eventually resolve, he also testified they may not and indicated the longer they remain the harder they would be to treat. As late as the regular hearing held in this proceeding on September 29, 1995, claimant continued to experience pain in her neck and shoulder similar to that reported to Dr. Sankoorikal. Based on the entire record, the Appeals Board finds claimant has established injury to the neck and shoulders for which she is entitled permanent partial disability benefits. Should claimant's condition improve, the respondent may seek review and modification of this Award.

Respondent also contends claimant should be limited to permanent partial disability benefits based upon the stipulated 17 percent whole bodily functional impairment rating for either one or both of the following reasons: (1) claimant voluntarily terminated her employment in April 1992, and (2) claimant unreasonably refused to actively seek employment after recovering from her surgeries. Respondent argues that the principles set forth in Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev.

denied 257 Kan. 1091 (1995) are applicable in this instance. The Appeals Board disagrees.

Although it is true that claimant did leave respondent's employment in April 1992, she then underwent bilateral carpal tunnel release surgery. After that surgery respondent did not offer claimant an accommodated position. As indicated in the vocational rehabilitation records introduced at Brad Ashens' deposition, respondent had no other work that was within claimant's restrictions with or without accommodation.

The Appeals Board also rejects respondent's argument claimant has not actively sought employment. Respondent contends claimant unreasonably refused to complete an interview with a telemarketing firm which would have paid a comparable wage. Because of that failure, respondent argues the Appeals Board should impute the telemarketing wage and apply the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e, as quoted above.

The Appeals Board finds claimant left the interview with the telemarketing company because she was embarrassed due to her inability to read the requested script. Claimant has an eighth grade education, has not completed a GED, reads at the seventh grade level, and has a significant deficit in both vocabulary and verbal skills. The Appeals Board finds claimant did not wrongfully terminate her interview with the telemarketing company and, also, questions whether the telemarketing position was an appropriate job in the first instance.

Based upon the entire record the Appeals Board finds claimant did not attempt to wrongfully manipulate her workers compensation claim as to invoke the principles of Foulk.

Based upon Mr. Longacre's testimony, the Appeals Board finds claimant has lost 79 percent of her ability to perform work in the open labor market and 36 percent of her ability to earn a comparable wage as a result of the injuries she sustained while working for the respondent. The wage loss percentage is based upon the finding claimant retains the ability to earn \$5 per hour, or \$200 per week, compared to claimant's \$311.22 average weekly wage as determined below. Averaging those losses yields a 58 percent permanent partial general disability upon which the Appeals Board finds appropriate to base the claimant's award.

(2) When stipulations were being taken at regular hearing, claimant represented to the Administrative Law Judge she was claiming an average weekly wage of \$314.61. However, in her brief to the Appeals Board, claimant alleges an average weekly wage of \$593.12 and contends she was either required or expected to work on Saturdays, or six days per week. Conversely, respondent contends claimant's average weekly wage was \$311.22 as indicated by the wage statement introduced at the regular hearing.

The Appeals Board finds claimant's average weekly wage is \$311.22 as indicated by the wage statement. Based upon the information contained in that wage statement, the Appeals Board is not persuaded that claimant regularly worked or was expected to work six days per week.

(3) Claimant is entitled to payment of, as authorized medical expense, the Newman Memorial Hospital emergency room bills incurred on September 19, 1994, and October 1, 1994, both in the sum of \$158.05. The Appeals Board finds those bills were reasonable and necessary expenses incurred to treat the effects of claimant's work-related injuries. Claimant's testimony is uncontroverted she sought medical treatment at the hospital emergency room in September 1994 when she experienced a locking sensation in her right index finger and wrist. In October 1994 claimant sought treatment at the same hospital emergency room for severe headaches. Dr. Sankoorikal related claimant's headaches to the neck and shoulder injuries. The Appeals Board finds those Newman Memorial Hospital bills were reasonable and necessary under the circumstances presented.

The Appeals Board denies claimant's request for payment of Dr. Mary Ann Hoffman's bill for services incurred in April 1992, as authorized medical expense. The Appeals Board is not persuaded respondent improperly refused to provide claimant medical treatment or that claimant even made a request for treatment before incurring that expense. Under the circumstances presented, it appears Dr. Hoffman's bill should be considered unauthorized medical expense subject to K.S.A. 1991 Supp. 44-510.

(4) The Appeals Board hereby adopts the Assistant Director's findings and conclusions to the extent they are not inconsistent with the above.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated August 20, 1996, entered by Assistant Director Brad E. Avery should be, and hereby is, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Therisa R. Martin, and against the respondent, IBP, Inc., and the Workers Compensation Fund, for an accidental injury which occurred February 11, 1991, and based upon an average weekly wage of \$311.22 for 67.14 weeks of temporary total disability compensation at the rate of \$207.49 per week or \$13,242.75, followed by 347.86 weeks of permanent partial disability benefits at the rate of \$120.35 per week or \$41,864.95, for a 58% permanent partial general disability, making a total award of \$55,795.83.

As of March 20, 1997, there is due and owing claimant 67.14 weeks of temporary total disability compensation at the rate of \$207.49 per week or \$13,930.88, followed by 251.29 weeks of permanent partial disability compensation at the rate of \$120.35 per week in the sum of \$30,242.75 for a total of \$44,173.63, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$11,622.20 is to be paid for 96.57 weeks at the rate of \$120.35 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders contained in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1997.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
Tina M. Sabag, Dakota City, NE  
Derek R. Chappell, Ottawa, KS  
Brad E. Avery, Assistant Director  
Philip S. Harness, Director